STATE'S RESPONSE TO DEFENDANT'S MOTION TO WITHDRAW FROM PLEA AGREEMENT

When the defendant does not show “manifest injustice,” and when he told the court during the change of plea colloquy that he understood the plea agreement and his rights and wanted to plead guilty, the trial court should deny the motion to withdraw from the plea agreement. He may not withdraw for “mistake of fact” unless the mistaken fact was unknown to the parties at the time of the plea and the mistaken fact was a primary motivator for the defendant to plead guilty. Denial of a motion to continue does not justify allowing a defendant to withdraw from his plea unless the denial causes “fundamental unfairness.” The court is not required to advise the pleading defendant that if he chose to go to trial he might be convicted of lesser charges.

The State of Arizona, by and through undersigned counsel, hereby respectfully requests this Court to deny the defendant's Motion to Withdraw from Plea, based on the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On March 23, 1997, the defendant was driving south on Cave Creek Road and struck a vehicle that was parked on the side of the road. The occupant of the vehicle, William King, was killed as a result of the defendant's recklessness. At the scene, the defendant told Officer Scott that he only had “a couple of drinks after work.” A blood draw taken at the hospital and later tested by the Arizona Department of Public Safety indicated the defendant's blood alcohol content to be .241% ethyl alcohol. The defendant was charged with Manslaughter, a class 2 dangerous felony.

On August 19, 1998, the defendant pleaded guilty to one count of Manslaughter, a class 2 dangerous felony. The plea agreement included a stipulation that “Defendant shall serve no less than seven years and no more than nine years in the Department of Corrections.” This Court advised the defendant of the possible range of sentence and the fact that probation was not available. This Court further explained the defendant's

constitutional rights that he was forfeiting by entering this guilty plea. This Court then asked the defendant if he wanted to forego these rights and the defendant answered, “Yes.” This Court then determined that the plea of guilty was made knowingly, intelligently, and voluntarily, not the result of force, threats or promises; that there was a factual basis for the plea; and that the defendant understood the range of sentences and other penalties available. The defendant then entered his guilty plea and this Court accepted the plea and entered it of record.

Sentencing was scheduled for September 28, 1998. On that date, the defendant appeared with new retained counsel and requested leave to file a motion to withdraw from the plea.

The defendant argues that case law allows for withdrawal from a guilty plea when withdrawal is necessary to correct a “manifest injustice.” However, the defendant has failed to show that any “manifest injustice” has occurred in this case. Furthermore, the defendant’s motion makes reference to the presentence report, in which the probation officer stated that he would have recommended probation had it not been a “dangerous offense.” If the defendant can withdraw from the plea, he can take his chances at trial and hope that the charges will not be designated a dangerous offense, thereby possibly escaping a prison sentence.

The defendant's previous defense attorney, Richard Gerry, was contacted for comment on this motion. Mr. Gerry declined to comment on the defendant's motion, stating it was his understanding that the motion only addressed the guilty plea proceeding and that the defendant was not waiving the attorney-client privilege.

LAW AND ARGUMENT:

Plea agreements are an effective and approved tool for effectuating public policy; they serve both the interests of justice and judicial economy. *State v. Watton*, 164 Ariz. 323, 793 Ariz. 80 (1990). These views are incorporated in the Rules of Criminal Procedure that permit the parties to reach an agreement on any aspect of the disposition of a case. Rule 17.4(a), Ariz. R. Crim. P. When the court accepts a plea agreement, the acceptance of the plea terminates the parties' right to unilaterally withdraw from it. Rule 17.4(b), Ariz. R. Crim. P. The court may accept a plea agreement only after it is satisfied that the agreement was entered voluntarily and intelligently. Rule 17.4 (c), Ariz. R. Crim. P. The court retains discretion to reject the agreement if, after reviewing a presentence report, the Court finds any of the parties' agreements to be inappropriate. Rule 17.4 (d), Ariz. R. Crim. P. A court may not *sua sponte* vacate a previously accepted plea agreement. *State v. Cooper*, 166 Ariz. 126, 800 P.2d 992 (App. 1990).

1. Rule 17.5, Ariz. R. Crim. P., requires the defendant to show a manifest injustice will result before a court may permit him to withdraw from an accepted plea agreement.

Once the court accepts a plea agreement, terminating the unilateral right of the parties to withdraw, a defendant may withdraw only when the court finds that withdrawal is necessary to correct a manifest injustice. Rule 17.5, Ariz. R. Crim. P. The Comment to Rule 17.5 states:

> The term manifest injustice is intended to include denial of effective assistance of counsel, failure to follow the procedures prescribed by Rule 17, and incorrect factual determination made under Rule 17.3, and such traditional grounds as “mistake and misapprehension,” *State v. Corvelo*, 91 Ariz. 52, 369 P.2d 903 (1962) and “duress and fraud,” *Silver v. State*, 37 Ariz. 418, 295 P. 311 (1931); *State v. Murray*, 101 Ariz. 469, 421 P.2d 317 (1966).

While a court should liberally exercise its discretion to allow withdrawal from a plea, the court must only do so when the defendant has met his burden to show that manifest injustice will result if the court does not permit withdrawal. *State v. Ellison*, 111 Ariz. 167, 526 P.2d 706 (1974); *State v. Romers*, 159 Ariz. 271, 766 P.2d 623 (App. 1988).

The standard for withdrawal is a high one. *State v. Anderson*, 147 Ariz. 346, 710 P.2d 456 (1985). A defendant is not permitted to withdraw from a plea agreement because he made a bad bargain; he may not use a guilty plea as a device to test the attitude of the trial court, being reasonably sure he can later withdraw. *State v. Phillips*, 108 Ariz. 332, 498 P.2d 199 (1972). Nor is it sufficient that a defendant, after seeing the presentence report and its recommendation, decides he prefers to have a trial. *State v. Faunt*, 139 Ariz. 111, 677 P.2d 274 (1984).

2. A defendant may not withdraw from a plea agreement based on a claim that he did not understand the plea proceeding when the record of the plea proceeding shows otherwise.

Appellate courts have upheld a trial court's discretion not to permit withdrawal from a plea when the defendant claims some defect in the plea proceeding that is not supported by the record. In *State v. Hamilton*, 142 Ariz. 91, 688 P.2d 983 (1984), the Arizona Supreme Court rejected Hamilton's claim that he entered a plea agreement because he was coerced by threats. The record showed that at the change of plea hearing the trial court extensively questioned Hamilton and Hamilton expressly told the judge that no force or threats were used to get him to plead guilty. *Id.* at 93, 688 P.2d at 985. The Court reasoned as follows:

> A defendant must not tell the judge that his plea is entered into voluntarily if it is not. It is no excuse that appellant thought the judge might not be trustworthy. If we were to

> grant any type of relief on this ground, every intelligent defendant entering a plea would tell the trial judge that the plea was entered into voluntarily and then wait for imposition of the sentence; if the sentence imposed were more harsh than anticipated or desired, the defendant would claim he entered the plea involuntarily but could not tell the judge, fearing the judge could not be trusted. Such a sequence of event would make a mockery of our justice system and of course will not be allowed. It is also no excuse that appellant feared being returned to the Maricopa County Jail. If told about the threats, the judge could have ascertained if there really were any danger to appellant and, if so, could have arranged appropriate safety precaution. Both of these claims are foreclosed by the trial judge's *Boykin* questioning and appellant's responses at the time of the change of plea.

State v. Hamilton, 142 Ariz. at 93, 688 P.2d at 985. See also *State v. Chudy*, 146 Ariz. 385, 387-88, 706 P.2d 397, 399-400 (App. 1985) [defendant's claim about state representations about sentencing during plea negotiations was meritless in light of defendant's responses during change of plea hearing].

3. A defendant may not withdraw from a plea agreement for mistake of fact unless the mistake was unknown to the parties when the agreement was entered and the existence of the mistaken fact was a primary motivator for entering the agreement.

In limited circumstances, a trial court may find that the parties were mistaken as to a material issue of fact when they entered a plea and permit withdrawal. *In State v. City Court of Tucson*, 131 Ariz. 236, 640 P.2d 167 (1981), the defendant entered a plea to felony DUI, believing that his driver's license was suspended at the time of his arrest. Later investigation revealed that the defendant's license had not been suspended, negating the basis for the original charge and the motivation for entering the plea. The plea would no longer serve the interests of justice, so the defendant was permitted to withdraw. *Id*. at 237, 640 P.2d at 168. Similarly, in *State v. Stevens*, 154 Ariz. 510, 744 P.2d 37 (App. 1987), all of the parties believed that the defendant had been on parole at

the time of the offense, and the State had filed sentencing enhancement allegations based on that belief. The defendant entered a plea agreement to an offense committed while on parole. After the defendant was sentenced, the Arizona Supreme Court invalidated the parole provision that had been the basis for the defendant's parole status. Thus, the defendant, who entered the plea agreement believing his potential sentence could be enhanced by his parole status, was permitted to withdraw because the very basis for why he entered the agreement was void and he could not have known that at the time he entered the agreement. *Id*. at 515, 744 P.2d at 42.

In *State v. Anderson*, 147 Ariz. 346, 710 P.2d 456 (1985), the defendant entered a plea agreement to a drug charge before the substance was analyzed and the trial court accepted the plea. The lab report later showed that no illegal drug was present in the substance. The defendant claimed that his attorney told him he could withdraw from the plea if the lab report was negative. Defense counsel did not advise him that there was a high standard for withdrawal and that the decision to withdraw was not unilateral. The court permitted withdrawal because defense counsel's misadvice went to the heart of defendant's motivation to enter the plea, *i.e.,* the existence of a factual predicate for the plea agreement. *Id*. at 352, 710 P.2d at 462.

4. A defendant may not withdraw from a plea agreement for denial of a procedural request unless the denial caused fundamental unfairness.

In *State v. Triplett*, 96 Ariz. 199, 393 P.2d 666 (1964), the defendant requested a 30-day trial continuance in order to prepare an insanity defense; the trial court denied the motion. The defendant then entered a plea agreement instead of proceeding to trial. The court then ordered a presentence mental health evaluation. The evaluation

included a doctor's opinion that defendant was insane at the time of the crime. The defendant would have gathered evidence to support his insanity defense if the trial court had not denied his motion to continue. The defendant moved to withdraw from his guilty plea, but the trial court denied his request. The *Triplett* Court reversed, allowing defendant to withdraw his plea in order to permit this new evidence to be presented to a jury. *Id*. at 202, 393 P.2d at 669.

5. Manifest injustice includes ineffective assistance of counsel.

> In deciding whether counsel was ineffective and whether such ineffectiveness warrants a withdrawal of the plea, this Court applies a two-prong test . . . (citations omitted) 1) was counsel's performance reasonable under all the circumstances, *i.e*. was it deficient? *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985), and 2) was there a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different," the prejudice requirement. *State v. Lee,* 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984).

State v. Anderson, 147 Ariz. 346, 351, 710 P.2d 456, 461 (1985).

When there is a question as to the defendant's guilt or innocence at the time of the plea, the court has been more likely to find ineffective assistance of counsel. In *Anderson*, the Arizona Supreme Court held that counsel's failure to inform the defendant of the discretionary nature of plea withdrawal and the high standard involved constituted ineffective assistance of counsel. *Id.* at 352, 710 P.2d at 464 (1985). In *Anderson*, the defendant pleaded guilty before the results of a drug test were in. His counsel told him he could withdraw his plea if the test results came in negative. Because the results were negative, the defendant was really innocent all along. Likewise, in *State v. Mott*, 150 Ariz. 79, 722 P.2d 247 (1986), the defendant claimed he was misled by counsel and the court into believing that he could routinely withdraw his

plea when he found then-unavailable facts showing his innocence. The trial court and counsel had explained Rule 32's “newly discovered evidence” post-conviction relief standard to the defendant. The Arizona Supreme Court found that the defendant made a knowing, voluntary, and intelligent plea. *Id*. at 82, 722 P.2d 247, 250 (1986). In *State v. Flewellen*, 127 Ariz. 342, 345, 621 P.2d 29, 32 (1980), the Arizona Supreme Court wrote: “We are satisfied that there is nothing in the record to show that the defendant is innocent of the offense.”

The factual basis in this case clearly establishes reckless behavior. The defendant drove off a roadway and struck a parked car, killing its occupant. His blood alcohol content was more that twice the legal limit for an impaired driver. He litigated a suppression motion regarding the blood test. When his motion to suppress was denied, he entered into the plea agreement. The agreement, a standard form used daily in this Court, advised the defendant of the charge to which he was pleading guilty; the fact that it was a dangerous offense; the sentence range; and the rights he was forfeiting by not going to trial. During the guilty plea proceeding, this Court also advised the defendant of those same rights. Nothing in the standard plea agreement or in the script normally used by the Court to conduct guilty plea inquiries requires the Court to inform the defendant that if he went to trial, he might be found guilty of less serious charges. The defendant has cited no authority requiring the Court to make such an advisement. The plea offer was fair, there is no allegation of a mistake of fact, and apparently the defendant does not allege ineffective assistance of counsel.

CONCLUSION:

Based on the above points and authorities, the State respectfully requests this Court to deny the defendant's motion to withdraw from the plea.